UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

BAPTIST HEALTH NURSING AND REHABILITATION CENTER, INC.

and **Cases 03-CA-153365**
03-CA-160251

1199 SEIU UNITED HEALTHCARE WORKERS EAST

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

This matter was heard by Administrative Law Judge Geoffrey L. Carter (ALJ) on January 26-27, 2016. A Complaint and Notice of Hearing in Case 03-CA-153365 issued on August 26, 2015. (GC Ex. 1[e]).[1] An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on October 23, 2015, based on charges in Cases 03-CA-160251 and 03-CA-153365. (GC Ex. 1[j]).

The Complaint, as amended orally at hearing, alleges that Baptist Health Nursing and Rehabilitation Center, Inc. (Respondent) violated Section 8(a)(1) and (5) of the Act by suspending and terminating its employees Carmel Sparks and Yadira Lambert without prior notice to 1199 SEIU United Healthcare Workers East (Union) and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

Respondent, in its Amended Answer, admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act. Respondent further admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent admits that the following individuals held the positions set forth below and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act: Timothy Bartos is Respondent's President and CEO. (GC Ex. 1[o]). Johnathan (Pete) Steffan acts as Respondent's Director of Human Resources and has since October 2013. (Supp. Tr. 5). From approximately April 24,

[1] Throughout this brief the following references will be used: GC Ex. ___ for General Counsel's exhibit; R. ___ for Respondent's exhibit; Tr. ___ for transcript page(s); and Supp. Tr. ____ for supplemental transcript page(s).

2015 through July 8, 2015, Cynthia Lyden held the position of acting Director of Nursing. (GC Ex. 1[o]). Upon Lyden's departure, since July 6, 2015, Melanie Williams held the Director of Nursing position. (Tr. 373). From May 6, 2015 until July 17, 2015, Laura Shinn held the title of Nursing Supervisor. (Supp. Tr. 5). Until July 26, 2015, Katrina Davis held the title of Agency Nurse Supervisor, and since July 27, 2015 she has held the title of RN Head Nurse. (Supp. Tr. 5-6). Sherri Martone worked for Respondent between March 13, 2015 and September 18, 2015 where she acted as an agent/supervisor. (GC Ex. 1[o]).

The Complaint, as amended, also alleges that Kerri DeMasi held the position of Staffing Coordinator since October 2010 and has been a supervisor and an agent of Respondent within the meaning of the Act. (Supp. Tr. 7). While Respondent only admitted to her title and dates of service rather than her supervisory/agency status, the record reveals that DeMasi was an agent/supervisor within the scope of attendance issues. (Tr. 81-82).

Respondent also admits that on May 4, 2015, the Board certified the Union as the exclusive collective-bargaining representative of an appropriate bargaining unit consisting of:

> All full-time, regular part-time, and per diem service and maintenance employees employed by the Employer at its Scotia, New York facility, including all CNAs, maintenance/security workers, porters, laundry aides/workers, housekeeping aides/workers, ward clerks, activity aides, floor helpers, restorative associates, restorative nurse aides, transport clerks/drivers and transport aides; but excluding transport coordinators, licensed practical nurses, guards, professional employees and supervisors as defined in the Act, and all other employees. (GC Ex. 2; Tr. 29)

Respondent also admits that it terminated Carmel Sparks on about June 3, 2015. (GC Ex. 1[o]). Respondent further admits that it terminated Yadira Lambert on about August 3, 2015. (GC Ex. 1[o]). Finally, Respondent "admits that it terminated the employment of Carmel Sparks and Yadira Lambert without prior notice to the Union." (GC Ex. 1[o]).

Respondent denies that it violated Section 8(a)(1) and (5) of the Act when it suspended and terminated Carmel Sparks and Yadira Lambert without first notifying and bargaining with the Union.

II. FACTS

A. Background

Respondent is a corporation engaged in the operation of a nursing home. (GC Ex.1[j]). On April 24, 2015,[2] an election was held between the Union and Respondent where the employees overwhelmingly elected the Union as their representative. (Tr. 29, 115). On May 4, the Union was certified as the employee's elected bargaining representative. (Tr. 29, GC Ex. 2). Bargaining for the first collective-bargaining agreement between the parties commenced in about July. (Tr. 29, 116, 151). There have been approximately six bargaining sessions, but to date, no agreement has been reached. (Tr. 29, 116, 151, 269-70). Similarly, no interim grievance or arbitration procedure has been established. (Tr. 151).

Carmel Sparks was hired in April 2014 as a per diem certified nursing assistant (CNA) at Respondent's facility. (Tr. 47). On May 15, LPN Karen Comerford yelled at and aggressively put her hands in Sparks' face while she was working. (Tr. 49). Sparks politely excused herself and approached the supervisor on duty, Sherri Martone. (Tr. 49). Sparks felt uncomfortable returning to the unit where Comerford was still working. (Tr. 54). Unfortunately, Martone told her there were no other units available. (Tr. 54). When Sparks indicated she was going to leave the facility, Martone raised no objections. (Tr. 54). On May 20, Sparks was suspended without pay for her conduct on May 15. (Tr. 57-58, 64). On about June 2, Sparks was terminated for that conduct. (Tr. 47, 64, 66).

[2] All dates are in 2015 unless otherwise noted.

On June 9, 2014, Respondent hired Yadira Lambert as a full-time CNA. (Tr. 73, GC Ex. 8). On June 1, Lambert's supervisor, Laura Shinn, directed her to go home for failure to make adequate eye contact during a mid-shift impromptu meeting. (Tr. 74). Lambert was suspended without pay from June 1 until approximately June 19. (Tr. 76-77; GC Ex. 10). Respondent later terminated Lambert on August 3, for allegedly having two no call/no shows within a one year period. (Tr. 78).

Respondent failed to notify the Union about the suspensions or terminations that Sparks and Lambert received. (Tr. 269-70; GC Ex. 1[o]). Respondent never gave the Union the opportunity to bargain about the suspensions or terminations.

B. Respondent issued discretionary suspensions and terminations to Carmel Sparks and Yadira Lambert.

To determine whether and under what circumstances employees should be disciplined, Respondent keeps and maintains an employee handbook that it uses only as a guideline. (Tr. 229). What the handbook lists as terminable offenses, the Director of Human Resources, Jonathan (Pete) Steffan, describes as a nonexclusive "list to items that are serious enough and infractions that **could** result in immediate termination." (Tr. 153, emphasis added). Included in that list are "leaving the property without following proper procedure" and no call/no show absences. (R. Ex. 3). In addition to the handbook's guideline, Respondent also performs disciplinary investigations. (Tr. 229). These investigations include fact gathering such as speaking to witnesses, gathering employee statements, and reviewing those employee statements. (Tr. 230). These disciplinary investigations are performed even when the handbook otherwise indicates that the alleged conduct could result in immediate termination. (Tr. 230; R. Ex. 3). These disciplinary investigations are performed to establish whether an employee engaged in the

misconduct and to determine the level of discipline required before final discipline issues. (Tr. 230).

1. Respondent suspended and terminated Carmel Sparks.

Respondent hired Carmel Sparks in April 2014 as a per diem certified nursing assistant (CNA). (Tr. 47). Sparks was assigned to work the day room on May 15. (Tr. 47). The day room is where residents congregate. (Tr. 47-48). Both CNAs and LPNs can supervise residents in the day room. (Tr. 95). LPN Comerford approached Sparks during her shift and asked her to turn off the television and play music in the day room instead. (Tr. 48). After playing approximately six songs and the room had calmed down, Sparks turned the television on again. (Tr. 48-49). Comerford came into the day room yelling and aggressively putting her hands in Sparks' face. (Tr. 49). Sparks approached Martone, the supervisor on duty, and gave a statement about what occurred. (Tr. 49-50; GC Ex. 5). Sparks felt uncomfortable returning to the unit where Comerford was still working and told Martone as much. (Tr. 54, 319). Martone told her there were no other units available. (Tr. 54). When Sparks indicated she was going to leave the facility, Martone raised no objections. (Tr. 54). Sparks was not immediately terminated for the incident on May 15; rather, she worked a few days after the incident. (Tr. 240-41).

On May 20, Sparks approached Human Resources and spoke to Steffan to start the process of resolving the issue between herself and Comerford. (Tr. 54-55, 160). At that time, Steffan was unaware of what had occurred on May 15. (Tr. 55, 160, 241). There was no discussion about terminating her employment. (Tr. 179, 242). However, as a result of the conversation between Steffan and Sparks on May 20, Sparks was suspended without pay. (Tr. 57-58, 64, 243).

After his meeting with Sparks, Steffan performed an investigation. (Tr. 180). In fact, as part of his regular duties Steffan performs disciplinary investigations and has input on employee disciplines. (Tr. 150-51). During this investigation, he reviewed witness statements, spoke to witnesses,[3] and reviewed security camera footage. (Tr. 161-62, 175, 180). Steffan performed an investigation because "there were some questions of fact here" that Respondent "would need to take some time to look into." (Tr. 179, 242). He also performed an investigation because he and the director of nursing had to determine whether Lambert had good cause to leave her shift. (Tr. 239).

Sparks was recalled to work on May 25, for about a half an hour until she was told that her being scheduled was a mistake and the director of nursing was sending her home to continue her unpaid suspension. (Tr. 60; GC Ex. 6). In total, Sparks missed approximately five days of work because of her unpaid suspension. (Tr. 64). Steffan claims that "we, after investigation, found that she had walked off the job mid-shift without good cause violating our attendance policy[4] on leaving the building without following the proper procedure." (Tr. 159). Following proper procedure involves informing someone in management of their departure. (Tr. 238). Respondent admits that it ultimately terminated Sparks on about June 2. (Tr. 47, 64, 66, 184; GC Ex. 1[o]).

[3] During his direct testimony Steffan stated that the breadth of his investigation was reviewing statements and watching security camera footage. However, on redirect he indicated he also spoke to witnesses about the incident. (Compare Tr. 181 "Q Did what you just describe to us to obtain the witness statements, reviewing the camera footage, and speaking to Sparks comprise your investigation into this incident A Yes. That would be the scope of my part of the investigation." with Tr. 277 where Steffan testifies that he spoke to some of the witnesses who provided written statements). On re-cross, Steffan admitted that he failed to mention that he spoke to witnesses. (Tr. 286).

[4] In its position statement to the Board, Respondent stated that Sparks was terminated for violating the attendance policy and insubordination. At the hearing, however, Respondent claimed that the only reason for termination was a violation of the attendance policy and her insubordination was not considered. (Tr. 234-35).

2. Respondent suspended and terminated Yadira Lambert.

Respondent hired Yadira Lambert as a full-time CNA on June 9, 2014. (Tr. 73, GC Ex. 8). On June 1, Lambert was called to an impromptu meeting at the nurses' station. (Tr. 74). During the meeting, Lambert's supervisor, Laura Shinn, directed her to go home for failure to make adequate eye contact during the meeting. (Tr. 74). Lambert was not making eye contact because she was reviewing her assignment sheet. (Tr. 74). After informing her fellow CNAs about the status of her residents to ensure they would be taken care of, Lambert left the unit as instructed. (Tr. 75). While Lambert was waiting in the lobby for her ride, Shinn appeared and told her to go wait outside and stand in the rain, or else security would be called. (Tr. 75). Steffan testified that he advised the director of nursing "she needed to investigate it, find out what happened, find out if there was just cause for the incident to happen." (Tr. 202). Lambert was suspended without pay pending the investigation from June 1 until approximately June 19. (Tr. 76-77, 203, 246, 248, 254; GC Ex. 10). During that time, Respondent was investigating the allegation of her insubordination. (Tr. 247). Insubordination is included in the employee handbook as conduct that results in immediate termination. (R. Ex. 3). Despite being recalled to work, Lambert was never paid for the time she missed. (Tr. 203).

Lambert worked without issue from her return on about June 19, until Respondent terminated her on August 3, for allegedly having two no call/no shows within a one year period. (Tr. 78, 205-06). The first alleged no call/no show occurred on April 26. (Tr. 263, R. Ex. 9). The second alleged no call/no show occurred on August 2. (Tr. 263; R. Ex. 9).

Respondent's employee handbook indicates that "an employee who receives two no call/no shows within one year, is subject to disciplinary action including termination." (R. Ex. 3). A no call/no show is when an employee fails to call in for a shift at least one hour into the shift

and does not appear for his or her scheduled shift. (Tr. 78, 156). However, it also indicates that the penalty for one no call/no show is a written warning. (R. Ex. 3). In terminating Lambert, Respondent cited an alleged no call/no show she received for missing a shift on April 26, as well as an alleged no call/no show for a shift on August 2. (Tr. 263; R. Ex. 9).

Lambert testified that she appropriately handled her shift on April 26 and did not no call/no show for that shift. (Tr. 94). In fact, Lambert testified that she had spoken to Staffing Coordinator, Kerri Demasi, who indicated that she was not a no call/no show in April and that she would be all set. (Tr. 94). Lambert never received a written warning for missing work on April 26, even though the handbook states that a written warning will issue and Steffan testified that is Respondent's practice. (Tr. 257, R. Ex. 3). Respondent admits that employees are not paid for no call/no shows. (Tr. 263). Lambert's timecard indicates that she was paid for April 26. (Tr. 268; GC Ex. 11). Steffan testified that the timecard "raises a question in my mind as to whether it's accurate or not or what's going on here." (Tr. 284). Steffan admits that one no call/no show is insufficient to justify termination. (Tr. 262).

Lambert's car, her only mode of transportation, broke down on Thursday, July 30. (Tr. 83). Lambert was scheduled to work Thursday, Friday, Saturday, and Sunday of that week. On Thursday, before the start of her shift, Lambert spoke to DeMasi to let her know that she would not be able to make her shift. (Tr. 84). In fact, she informed Demasi that she would not be able to make the remaining shifts for the weekend because her vehicle broke. (Tr. 85). While accepting the notice for that night's shift, Demasi refused to remove her from the schedule for the weekend and informed her that she would have to call in before every shift. (Tr. 345). However, Respondent admits that more notice in advance of an absence is better because it gives additional time to find a replacement. (Tr. 256).

As instructed, Lambert called again on Friday, July 31, for her shift that day, as her car was still inoperable. (Tr. 84). Again, on Saturday, August 1, Lambert was scheduled to work and had to call out. (Tr. 84-85). This day, she spoke to Sherri Martone and, just as she had explained to Demasi on Thursday, she asked to be taken off the schedule for the following day, Sunday, August 2 as well. (Tr. 85). Martone told her "Okay, that's fine. Hope you get your car trouble fixed." (Tr. 85). At the hearing, Martone was unable to recall what Lambert said about her Sunday, August 2 shift. (Tr. 313). Lambert had to have her car towed to the shop to be repaired, and did not get her car back until Tuesday, August 4. (Tr. 85, 91). Despite having apprised Martone of her absence, on August 3, Lambert was informed that she was being terminated for a no call/no show for Sunday, August 2 in addition to one she had received on April 26. (Tr. 78).

C. Respondent failed to notify the Union about the disciplines it issued to Sparks and Lambert, thereby never affording the Union the opportunity to bargain.

By way of its Amended Answer, "Respondent admits that it terminated the employment of Carmel Sparks and Yadira Lambert without prior notice to the Union." (GC Ex. 1[o]). Steffan is responsible for labor relations. (Tr. 149, 269). Part of those responsibilities includes communicating with the Union. (Tr. 269). Steffan never provided advanced notice to the Union about its decisions to discipline Sparks or Lambert. (Tr. 200). Specifically, Steffan admits that he never notified the Union about Sparks' suspension or termination before issuing them. (Tr. 269, 270). Also, Steffan admits that he never notified the Union about Lambert's suspension or termination before issuing these disciplines. (Tr. 269, 270). In justifying why notice was never given, Steffan postured that he "did not feel it was required." (Tr. 200; 216).

The Union's Vice President, Rosamaria Lomuscio, was Respondent's union contact after the Union won the election. (Tr. 30, 117). On May 22, Rosamaria Lomuscio caused a letter to be

sent to Respondent to request notification about any suspensions or terminations that had issued. (Tr. 121; GC Ex. 3). The Union apprised Respondent of its intent to rely on Alan Ritchey by specifically citing the case. (GC Ex. 3). Moreover, the letter requested any and all disciplines that had issued since the Union's certification on May 4. (Tr. 122; GC Ex. 3). Lomuscio sent the letter so that if disciplines had issued the Union could prepare a case to present to Respondent prior to bargaining. (Tr. 122). Respondent never notified the Union of the disciplines issued to Lambert or Sparks, despite the fact that Sparks had been suspended prior to Respondent's response to the letter. (Tr. 131). The affected employees informed the Union of their disciplines, but only after they had already been issued. (Tr. 63, 216, 246, 269-70). Respondent never notified the Union about its issuing of disciplines, and therefore, the Union could not request meaningful bargaining. (Tr. 21).

III. ANALYSIS

Respondent violated Section 8(a)(1) and (5) of the Act when it failed to notify and bargain with the newly certified Union over the discretionary disciplines issued to Carmel Sparks and Yadira Lambert. The Board has reached this conclusion both explicitly and impliedly. It is submitted that the Board's reasoning in Alan Ritchey, 359 NLRB No. 40 (2012) is sound, where it explicitly found that an employer must bargain with the union before imposing discretionary discipline during the interim period between the union's certification and the parties' first collective-bargaining agreement. This decision merely explained what had been implied for decades. Thus, even if the reasoning of Alan Ritchey is not followed in this case, a violation should still be found under the historical body of law where such a holding is implied.

A. Analyzing Alan Ritchey reveals that Respondent's conduct violated Section 8(a)(1) and (5) of the Act.

On December 14, 2012, in Alan Ritchey, Inc., 359 NLRB No. 40 (2012), the Board held that discretionary discipline is a mandatory subject of bargaining under NLRB v. Katz, and longstanding Board precedent. The Board held that before an employer and union have reached an initial collective-bargaining agreement, employers may not take certain disciplinary actions against unit employees without giving the union prior notice and an opportunity to bargain about the discretionary aspects of those actions. Alan Ritchey, 359 NLRB No. 40, slip op. at 1, 5-8. Thus, where an employer's disciplinary system is discretionary as to whether or what type of discipline will be imposed in particular circumstances, the employer must bargain with its employees' union representative over those discretionary aspects of its disciplinary system. The employer must provide notice and an opportunity to bargain before the imposition of disciplinary actions that have an immediate impact on employees' tenure, status, or earnings, such as suspension, demotions, discharges, or analogous sanctions. Id.

Although the Alan Ritchey decision was set aside because it was issued by an improperly constituted Board following the United States Supreme Court decision in NLRB v. Noel Canning, 134 S. Ct. 2550 (June 26, 2014), the rationale of that decision is sound. Alan Ritchey was not the only Board decision set aside by the Supreme Court's decision. So far, the Board has reissued approximately 93 of its decisions. Of those decisions, 89 were followed by the later properly constituted Board, only one was overruled, and three were modified. The new properly constituted Board has overwhelmingly adopted the reasoning of the previous Board. Accordingly, the General Counsel respectfully submits that the Board's reasoning in Alan Ritchey be adopted.

In its decision, the Board follows a three-part analysis to find a violation of 8(a)(1) and (5) of the Act: 1) no first contract between the parties; 2) discretionary disciplines; and 3) a failure to provide the Union with notice and opportunity to bargain over the discretionary disciplines. Here, the case satisfies all three requirements, and therefore Respondent's conduct violated Section 8(a)(1) and (5) of the Act.

1. The newly certified Union has yet to reach a first contract or interim grievance procedure with Respondent.

As the Board explained in Alan Ritchey, the notification and bargaining requirement applied when the employer and union had yet to reach an initial collective-bargaining agreement or interim grievance procedure. Alan Ritchey, 359 NLRB No. 40, slip op. at 1, 5-8. The parties are in this exact posture in this case. An election was held on April 24. (Tr. 29) The Union was certified as the bargaining representative for the employees on May 4. (Tr. 29; GC Ex. 2). While the parties have met and bargained over a first contract, no agreement has been reached. (Tr. 29, 116, 151, 269-70). Similarly, no interim grievance or arbitration procedure has been established. (Tr. 151). Accordingly, the parties are in the right posture for a continued Alan Ritchey analysis.

2. Respondent issued discretionary disciplines to Carmel Sparks and Yadira Lambert.

Simply following a past practice of disciplining employees does not establish a lack of discretion. Alan Ritchey, 359 NLRB No. 40, slip op. at 10. Rather, if the employer reserves the right to determine what employee misconduct warrant disciplinary action, that is sufficient to establish discretion. Id. Similarly, an employer determining the nature and severity of an offense when imposing discipline is satisfactory to establish discretion. Id. at 10-11.

Here, Sparks' unpaid suspension and eventual termination were discretionary. Steffan admits that he had to perform an investigation because "there were some questions of fact here"

that Respondent "would need to take some time to look into." (Tr. 179, 242). Steffan also performed an investigation to establish whether Sparks' actions were based on "good cause." (Tr. 159, 239). Resolving those issues of fact and determining "good cause," by their very nature, require discretion.

Similarly, Lambert's unpaid three week suspension required discretion. The record established questions of fact surrounding the incident for which she was suspended. Respondent was investigating an allegation of insubordination. (Tr. 247). Insubordination is included in the employee handbook as conduct that results in immediate termination. (R. Ex. 3). Lambert was eventually recalled from her suspension, meaning her version of events was credited. (Tr. 76-77, 203, 246, 248, 254; GC Ex. 10). Her eventual recall implies discretion in determining the extent of the discipline and about whether it was necessary in the first instance. Despite being recalled to work, Lambert was never paid for the time she missed. (Tr. 203). The practical effect of an unpaid suspension on an employee is discipline, regardless of Respondent's alleged motivation for doing so.

Additionally, Lambert's termination was also discretionary. Though Respondent argues that no call/no show terminations are based on a set handbook policy, Steffan testified that the handbook is only a guideline. (Tr. 229). What the handbook lists as terminable offenses, Steffan describes as a nonexclusive "list to items that are serious enough and infractions that **could** result in immediate termination." (Tr. 153, emphasis added). Moreover, even by this policy, an employee would need **two** no call/no shows in a year. The record establishes significant doubt as to whether Lambert even had one no call/no show.

With respect to the alleged no call/no show on April 26, Lambert was paid for work on that date. (Tr. 268; GC Ex. 11). Steffan testified that no call/no shows are unpaid. (Tr. 263).

Second, Lambert testified that DeMasi had cleared her for that day and that she would no longer be listed as a no call/no show for that date. (Tr. 94). Third, the handbook reveals that an employee should receive a written warning for their first no call/no show. (R. Ex. 3). Lambert never received such a warning. Thus, the record reveals the distinct likelihood that Lambert did not have a no call/no show in April.

The record also reveals that Lambert called in for her shift on August 2 on two separate occasions. She first notified DeMasi on Thursday, July 30, that she would be unable to attend her weekend shifts because she was having car trouble. (Tr. 345). Respondent admits that more notice is better so that a replacement can be found. (Tr. 256). Regardless, Respondent refused to accept her notice for the entire weekend on Thursday. (Tr. 345). Lambert then spoke to Martone on Saturday about her shift for the following day. (Tr. 85). Lambert again indicated that she would be unable to attend because she still had no car. According to Lambert, Martone approved her notice, saying "Okay, that's fine. Hope you get your car trouble fixed." (Tr. 85). Lambert's termination was ripe for bargaining with the Union because Lambert and Martone's version of events differ. One no call/no show is insufficient to justify termination. There remains a serious question of fact about whether Lambert had even one no call/no show. Thus, there was discretion used in evaluating whether she was even a no call/no show for April 26 or August 2.

3. Respondent failed to provide the Union with notice and the opportunity to bargain.

In Alan Ritchey, the Board explained that an employer must provide notice and an opportunity to bargain **before** imposing discretionary discipline. Alan Ritchey, 359 NLRB No. 40, slip op. at 1. There is no evidence in the record that Respondent notified the Union about suspending or terminating either employee before the action was taken. To the contrary, by way of its Amended Answer and testimony elicited at trial, Respondent admits that it failed to give

such notice. (Tr. 269, 270; GC Ex. 1[o]). Steffan admitted that communicating with the Union is his responsibility. (Tr. 269). Steffan further admitted that he never provided advanced notice to the Union about its decisions to discipline Sparks or Lambert. (Tr. 200). Specifically, Steffan admits that he never notified the Union about Sparks' suspension or termination before they were issued. (Tr. 269, 270). Steffan further admits that he never notified the Union about Lambert's suspension or termination before issuance. (Tr. 269, 270). Testimony from the Union representatives further establishes that such notice was never given. (Tr. 63, 131, 216, 246, 269-70). In justifying why notice was never given, Steffan postured that he "did not feel it was required." (Tr. 200; 216). To the contrary, under Alan Ritchey, such notice is obligatory and the Respondent failed to provide the required notice.

At the hearing, Respondent postured that the Union could have requested to bargain. However, such a request could only have been made after Respondent had already taken the adverse action against the employees. Such a request from the union would be *fait accompli*. The decision to discipline Sparks and Lambert had already been made by the time the Union was made aware of the act. Asking the Union to request bargaining, after the decisions had been made, would be meaningless. Indeed, "[n]o genuine bargaining over a decision can be conducted where that decision has already been made and implemented." Town & Country Manufacturing Co., Inc., 136 NLRB 1022, 1030 (1962) (restoring operations and reinstating discharged employees with backpay as remedy for unlawful unilateral subcontracting of those operations), enforced, 316 F.2d 846 (5th Cir. 1963).

4. Respondent must restore the status quo by bargaining, providing backpay, search for work expenses, rescinding the disciplines, and reinstating Lambert and Sparks.

In Alan Ritchey, the Board found that the disciplinary system was discretionary. Alan Ritchey, 359 NLRB No. 40, slip op. at 1. Although a discretionary disciplinary policy for broadly defined offenses was maintained, the Board reasoned that the employer exercised discretion in its choices of whether and how severely to discipline employees for particular violations, and reserved the right to impose discipline without progressing through each stage of its stated procedure. Id., slip op. at 10. Nonetheless, the Board found no violation based on the unilateral imposition of discretionary discipline because it determined that its holding should be applied prospectively only. Id., slip op. at 11. In reaching this conclusion, the Board reasoned that "retroactive application of our holding could well catch many employers by surprise and, moreover, expose them to significant financial liability insofar as discharges and other disciplinary actions that could trigger a back pay award are involved." Id., slip op. at 11. That is no longer a valid concern. Alan Ritchey was decided in 2012 and employers have had ample notice about the Board's intentions with respect to this issue. Specifically, this Respondent had notice that the Union was going to invoke the Board's ruling in Alan Ritchey as it was the subject line of its request for information about disciplines issued post-certification. (GC Ex. 3). Therefore, there is no reason to believe that Respondent has any explanation, other than willful refusal, to follow the Board's reasoning in Alan Ritchey and it should not be permitted to escape providing a meaningful remedy.

Because the holding of the case was not applied to the respondent in Alan Ritchey, there was no discussion of the appropriate remedy for its failure to bargain over the imposition of discretionary discipline. When an employer violates Section 8(a)(5) of the Act by unilaterally

changing terms and conditions of employment, the Board orders the employer to restore the status quo ante by, among other things, reinstating and making whole discharged employees and rescinding discipline where the discharges or discipline resulted from the unlawful unilateral change. These remedies are necessary to prevent Respondent from retaining the "fruits" of its violations of the Act and to offset the effects of the unfair labor practices on the union's bargaining position. See Beacon Piece Dyeing and Finishing Co., Inc., 121 NLRB 953, 963 (1958) (finding employer's unilateral increase in workloads and wages violated Section 8(a)(5) and stating that "a failure to restore the status quo allows the employer to retain the fruits of its unfair labor practices and gives the employer a possible advantage at the bargaining table."); Die Supply Corporation, 160 NLRB 1326, 1344 (1966) (ordering restoration of the status quo ante, including reinstatement and backpay, where employer unilaterally implemented various terms and conditions of employment following plant relocation), enforced, 393 F.2d 462 (1st Cir. 1968).

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment; the cost of tools or uniforms required by an interim employer; room and board when seeking employment and/or working away from home; contractually required union dues and/or initiation fees, if not previously required while working for respondent; and/or the cost of moving if required to assume interim employment. D.L. Baker, Inc., 351 NLRB 515, 537 (2007) (qualifying expenses include increased transportation costs); Cibao Meat Products & Local 169, Union of Needle Trades, Indus. &

Textile Employees, 348 NLRB 47, 50 (2006) (cost of tools or uniforms required by interim employer); Coronet Foods, Inc., 322 NLRB 837 (1997) (moving costs); Rainbow Coaches, 280 NLRB 166, 190 (1986) (union dues or initiation fees); Aircraft & Helicopter Leasing, 227 NLRB 644, 650 (1976) (room and board when seeking employment or working).

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. See W. Texas Utilities Co., 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."). See also North Slope Mechanical, 286 NLRB 633, 641 n.40 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses. In Re Midwestern Pers. Servs., Inc., 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." Jackson Hosp. Corp., 356 NLRB No. 8 at *3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). See also Pressroom Cleaners & Serv. Employees Intl Union, Local 32bj, 361 NLRB No. 57 at *2 (Sept. 30, 2014) (quoting Phelps Dodge). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, available at 1992 WL 189089 (July 14, 1992); Hobby v. Georgia Power Co., 2001 WL 168898 at *29 (Feb. 2001), aff'd Georgia Power Co. v. U.S. Dep't of Labor, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." Don Chavas, LLC, 361 NLRB No.

10 at *3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period. These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. See Jackson Hosp. Corp., 356 NLRB No. 8 at *1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

In Alan Ritchey, the Board clearly contemplated these remedies on a prospective basis. As noted above, the Alan Ritchey Board's rationale for not applying its holding retroactively was that it could impose an unexpected backpay burden on employers. It is no longer unexpected. More importantly, if reinstatement, backpay, and the other standard remedies for unlawful discharges were not imposed, employers would have no incentive to engage in pre-imposition bargaining over discipline. Accordingly, Respondent should be required to restore the status quo by bargaining and providing backpay and reinstatement to affected employees.

5. There are no extenuating circumstances alleviating Respondent's duty to bargain under Alan Ritchey.

The Board limited the pre-imposition duty to bargain in certain respects because of "the unique nature of discipline and the practical needs of employers" Id., slip op. at 1. Specifically, the employer need not bargain to agreement or impasse at this stage, so long as it does so after implementation of the disciplinary decision. In addition, an employer may act unilaterally in situations that present "exigent circumstances: that is, where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel." Alan Ritchey, 359 NLRB No. 40, slip op. at 8-9. The Board stated that it would define the scope of this exception on a case-by-case basis, but

noted that the exception would encompass situations where an employer "reasonably and in good faith believes that an employee has engaged in unlawful conduct, poses a significant risk of exposing the employer to legal liability for his conduct, or threatens safety, health, or security in or outside the workplace." Alan Ritchey, 359 NLRB No. 40, slip op. at 9. Where such exigent circumstances exist, the employer can suspend the employee pending investigation, promptly notify the union of its action, and bargain over the suspension after the fact, as well as over any subsequent disciplinary decisions resulting from its investigation. 359 NLRB No. 40, slip op. at 9 n.19.

Here, no such exigent circumstances exist and Respondent did not assert that there were such exigent circumstances. Moreover, there is no evidence in the record that Respondent had any reason to believe that either Carmel Sparks or Yadira Lambert engaged in conduct that was unlawful, that would expose Respondent to legal liability or threatened workplace health and safety. To the contrary, Sparks worked for days after the conduct Respondent eventually used to justify her suspension and termination. (Tr. 241). Similarly, Lambert was brought back to work after her suspension. (Tr. 78). Additionally, Lambert's alleged no call/no show conduct is not one that is contemplated under the exceptions carved out of the Board's ruling. Importantly, Respondent never promptly notified the Union of its "investigatory suspension" as required. Alan Ritchey, 359 NLRB No. 40, slip op. at 9 n.19. In conclusion, no exigent circumstances exist that would permit Respondent to escape liability.

B. A historical analysis of Board precedent supports finding a violation for Respondent's conduct.

Alan Ritchey was not decided in a vacuum. Rather, the Board's holding was founded on decades of previous Board decisions and its reasoning relied on public interest. Therefore, even

if the Board's well-reasoned decision in Alan Ritchey is not followed in this case Respondent still violated the Act.

It is well-established that an employer whose employees are represented by a union violates Section 8(a)(5) by making unilateral changes to employees' terms and conditions of employment. NLRB v. Katz, 369 U.S. 736 (1962). Employers must bargain with the union with respect to mandatory subjects of bargaining or it violates Section 8(a)(5). Fibreboard Paper Products v. NLRB, 379 U.S. 203, 209-210 (1964). So long as the change materially, substantially, and significantly impacted terms and conditions of employment, bargaining is required. Toledo Blade Co., 343 NLRB 385, 387 (2004). Both termination of employment and suspending an employee without pay are examples of mandatory bargaining subjects. N.K. Parker Transport, Inc., 332 NLRB 547, 551 (2000); Pillsbury Chemical Co., 317 NLRB 261, 261 n.2 (1995). Even unilaterally changing terms and conditions of employment for one employee violates Section 8(a)(5). Carpenters Local 1031, 321 NLRB 30, 32 (1996).

The Board used the NLRB v. Katz reasoning frequently throughout the years when handling cases involving discretionary unilateral changes to terms and conditions of employment. For example, the Board has held that an employer could no longer unilaterally exercise its discretion with respect to layoffs after a union was certified. Adair Standish Corp., 292 NLRB 890, 890 n.1 (1989). In Eugene Iovine, Inc., the Board found that an employer unlawfully implemented discretionary reduction in work hours where union had no notice of or opportunity to bargain over reduction before it occurred. Eugene Iovine, 328 NLRB 294, 294 n.1 (1999), enforced, 1 F. Appx. 8 (2d Cir. 2001). The Board has also held that an employer violated Section 8(a)(5) by implementing discretionary merit increases without providing the union notice

and an opportunity to confer about the proposed increases before they became effective. Oneita Knitting Mills, 205 NLRB 500, 500 n.1 (1973).

Admittedly, the Alan Ritchey decision departed from the Board's silent affirmation of an ALJ decision in Fresno Bee, 337 NLRB 1161 (2002). However, Fresno Bee is not the only case to address this issue and cannot be viewed to overrule all previous law on the issue. Importantly, the ALJ's decision in Fresno Bee failed to address how discretionary discipline differs from other unilateral changes that have been mandatory subjects of bargaining for decades. Id. at 1186. The ALJ misunderstood the requirements for mandatory subjects of bargaining by finding that the employer would have had to change the **entire disciplinary system** to amount to a unilateral change. Id. (emphasis added). The requirement that the entire system be changed to require bargaining, and ignoring all discretionary aspects of that system, is belied by all previous law on the matter. With Fresno Bee being the one exception, Board precedent as a whole supports a finding that an employer violates Section 8(a)(1) and (5) of the Act when it fails to bargain with a newly certified union over the imposition of discretionary discipline.

Respondent issued Sparks and Lambert discretionary disciplines that are related to their wages, hours, and other terms and conditions of employment. Even if the suspensions of Sparks and Lambert were not disciplinary in nature, Respondent still unilaterally implemented an unpaid suspension. Implementing those discretionary measures affecting wages are mandatory subjects of collective bargaining. Therefore, it is reasonable to rely on over fifty years of Board law in finding that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally issuing these discretionary disciplines.

IV. CONCLUSION

Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally issued discretionary disciplines to Carmel Sparks and Yadira Lambert without first notifying and bargaining with the Union. The General Counsel is not asking for a finding that makes some great departure from precedent. Rather, finding a violation of 8(a)(1) and (5) of the Act for Respondent's conduct is supported by half a century's worth of implicit and explicit Board law. Therefore, the General Counsel respectfully submits that, for all the reasons set forth above, Respondent violated Section 8(a)(1) and (5) of the Act by suspending and terminating its employees Carmel Sparks and Yadira Lambert without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct. General Counsel respectfully requests that the ALJ issue a decision and recommended order granting the relief sought herein.

V. PROPOSED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act by suspending and terminating its employees Carmel Sparks and Yadira Lambert without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VI. PROPOSED ORDER

Respondent, Baptist Health Nursing and Rehabilitation Center, Inc., its officers, agents, successors, and assigns shall

1. Cease and desist from:

   a. Suspending, discharging or otherwise disciplining employees without first notifying and bargaining with the Union.

   b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

   a. Within 14 days from the date of this Order, offer Carmel Sparks and Yadira Lambert full reinstatement to their former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

   b. Make Carmel Sparks and Yadira Lambert whole, with interest, for any loss of earnings and benefits suffered by them as a result of their unlawful suspension and discharge.

   c. Within 14 days of the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Carmel Sparks and Yadira Lambert, and, within 3 days thereafter, notify them in writing that this has been done and that their suspension and termination will not be used against them in anyway.

   d. Within 14 days of the date of this Order, bargain with the Union as the exclusive collective-bargaining representative of our employees about the suspension and termination issued to Carmel Sparks and Yadira Lambert.

   e. Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records and reports, and all such other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

   f. Within 14 days after service by the Region, post at its facility in Scotia, New York copies of the attached notice marked "Appendix." Copies of this notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at Baptist Health Nursing and Rehabilitation Center located in Scotia, New York since May 4, 2015.

g. Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

VII. PROPOSED NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union,
Choose representatives to bargain with us on your behalf,
Act together with other employees for your benefit and protection,
Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with, restrains or coerces you with respect to these rights.

WE WILL NOT unilaterally impose discretionary discipline including suspensions, discharges, demotions or other types of discipline which have an immediate impact on employees' tenure, status or earnings without timely notifying 1199 SEIU United Healthcare Workers East (the Union) and allowing the Union to request and engage in bargaining prior to our imposing such discipline on employees.

WE WILL NOT refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time, regular part-time, and per diem service and maintenance employees employed by the Employer at its Scotia, New York facility, including all CNAs, maintenance/security workers, porters, laundry aides/workers, housekeeping aides/workers, ward clerks, activity aides, floor helpers, restorative associates, restorative nurse aides, transport clerks/drivers and transport aides; but excluding transport coordinators, licensed practical nurses, guards, professional employees and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL, upon request, bargain in good faith with the Union regarding the suspension and discharge of Carmel Sparks and Yadira Lambert.

WE WILL reinstate Carmel Sparks and Yadira Lambert to their former positions and **WE WILL** pay them for the wages and other benefits they lost because we suspended and then fired Sparks and Lambert without first bargaining with the Union.

WE WILL, before issuing discretionary discipline which has an immediate impact on employees' tenure, status or earnings, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit described above.

DATED at Buffalo, New York, this 7th day of March, 2016.

/s/ Jessica L. Noto_____
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